

1 **COMP**

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5 UNITED STATES DISTRICT COURT

6 DISTRICT OF NEVADA

7 Laurie Tsao, a/k/a Laurie Chang)

8)
9 Plaintiff,)

10 vs.)

Case No: 2:08-cv-00713-RCJ-GWF

11 Desert Palace, Inc., T. Crumrine, and Does)
12 I-XX, jointly and severally)

13 Defendants.)

14 **MOTION FOR PARTIAL SUMMARY JUDGMENT DETERMINING THAT**
15 **DEFENDANT, DESERT PALACE, INC., HAD NO AUTHORITY TO DEMAND THE**
16 **PLAINTIFF LEAVE THE PREMISES OR ARREST HER ON FAILING TO DO SO,**
17 **AND DETERMINING THAT A PRIOR WARNING NO TO TRESPASS WAS**
INEFFECTIV, AND THEREFORE, COMMITTED FALSE IMPRISONMENT

18 Now comes plaintiff, and herewith moves for partial summary judgment pursuant to
19 NRCP 56 determining defendant had no authority to demand the plaintiff leave the premises or
20 eject plaintiff from its premises at the onset, and for liability for false imprisonment. This
21 motion is based on the pleadings and papers on file to date, the attachments hereto, the following
22 memorandum of points and authorities, and any oral argument the court deems appropriate.

23
24 ///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. CONCISE STATEMENT OF FACTS**

3 1. Plaintiff is an advantage gambler skilled in a method of playing blackjack known as “card
4 counting.”

5 2. On September 23, 2007, Defendant, Desert Palace (Caesars), cited Nev. Rev. Stat. 207.200
6 and informed plaintiff that she was being barred from the property due to her skill at blackjack,
7 and was not welcome to return.

8 3. Thereafter, plaintiff received express invitations to return to Caesars. *See* Exhibit 1.¹

9 4. On March 19, 2008, plaintiff had returned to Caesars and was playing blackjack.

10 5. Plaintiff was approached by Caesars personnel on that date.

11 6. Caesars personnel then conducted a citizen’s arrest of the plaintiff for returning to the
12 property, purportedly in violation of Nev. Rev. Stat. 207.200, and plaintiff was issued the
13 Misdemeanor Citation/Complaint attached as Exhibit 2.

14 7. In accord with the citizen’s arrest of the plaintiff, plaintiff was taken to the security office at
15 Caesars over her protest, and subsequently transported to the Clark County Detention Center.

16 8. The State subsequently abandoned the prosecution of the plaintiff.
17
18 *See* Affidavit of Plaintiff, Exhibit 3.

19 **II. ISSUES PRESENTED FOR DETERMINATION**

20 **ISSUE 1:** Was there any legal effect to the trespass warning given to plaintiff on September 23,
21 2007? (Plaintiff contends that there was not as a matter of law).
22

23
24
25 ¹ The attached Exhibit 2 has been written over the original writing to highlight the contents of the
exhibit. Had a later generation copy been attached, it would not have been legible. Plaintiff’s
counsel has a copy of an earlier generation of Exhibit 1 that is legible, and the attached exhibit
truly represents the contents of this earlier generation.

1 **ISSUE 2:** If the court is in agreement that there was no legal effect to the trespass warning given
2 plaintiff on September 23, 2007, is plaintiff entitled to partial summary judgment of liability
3 against Caesars for false arrest/imprisonment?

4 **III. ANALYSIS**

5 **A. SUMMARY JUDGMENT STANDARD**

6 When there is no genuine issue as to any material fact, a claimant is entitled to summary
7 judgment as a matter of law. Fed. R. Civ. P. 56. The United States Supreme Court has
8 explained:

9
10 In our view, the plain language of Rule 56(c) mandates the entry of
11 summary judgment, after adequate time for discovery and upon
12 motion, against a party who fails to make a showing sufficient to
13 establish the existence of an element essential to that party's case,
14 and on which that party will bear the burden of proof at trial. In
such a situation, there can be 'no genuine issue as to any material
fact,' since a complete failure of proof concerning an essential
element of the nonmoving party's case necessarily renders all other
facts immaterial.

15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Further, the Supreme Court explained
16 the judge's role in evaluating the evidence to determine whether there is a failure of proof:

17 [A]t the summary judgment stage the judge's function is not himself
18 to weigh the evidence and determine the truth of the matter but to
19 determine whether there is a genuine issue for trial. . . . [T]here is no
20 issue for trial unless there is sufficient evidence favoring the
21 nonmoving party for a jury to return a verdict for that party. . . . If
the evidence is merely colorable, . . . or is not significantly probative,
. . . summary judgment may be granted.

22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986).

23 It should be noted that Caesars will likely posit that further discovery is necessary. This
24 is a red-herring in the case at bar. The central facts upon which this motion is based fall within
25 the complete knowledge of Caesars should they desire to contest any of the facts presented.

Caesars first ejected plaintiff because she was a card counter. The second ejection occurred, by

1 the citation signed by Caesars' employee, because plaintiff returned to the premises after having
2 been previously ejected.² In short, material facts contradicting the foregoing must by definition
3 be presently known to defendant, and there is no basis to delay ruling of the issue presented.

4 Lastly, Fed. R. Civ. P. 56(a) authorizes summary judgment on a "part of a claim." As the
5 Notes of the Advisory Committee on the 1946 amendments to Fed. R. Civ. P. 56 notes:

6 The partial summary judgment is merely a pretrial
7 adjudication that certain issues shall be deemed established for the
8 trial of the case. This adjudication is more nearly akin to the
9 preliminary order under Rule 16, and likewise serves the purpose
of speeding up litigation by eliminating before trial matters
wherein there is no genuine issue of fact.

10 The issue presented falls squarely within this purpose and intent behind the rule. Simply, if
11 Caesars had no right to eject the plaintiff as indicated in Exhibit 2, then the plaintiff's return
12 referenced in was entirely privileged and legal. Thus, resolution of this issue will eliminate
13 matters before trial, and the motion is appropriately presented.

14 **B. PLAINTIFF HAD A RIGHT TO BE ON THE PREMISES OF CAESARS IN THE**
15 **FORM OF A CONDITIONAL LICENSE REVOCABLE ONLY UPON CERTAIN**
16 **CONDITIONS, THE CONDITIONS DID NOT EXIST, AND CAESARS HAD NO**
ABILITY TO REVOKE THAT LICENSE AND EJECT PLAINTIFF

17 **1. GAMING LICENSEES CANNOT AVAIL THEMSELVES OF THE STATUTORY**
18 **ABILITY TO EJECT ANY PERSON FOR ANY REASON FOUND AT NEV. REV.**
STAT. 207.200

19 The law in Nevada requires that Caesars allow plaintiff to gamble, even if she is a winner
20 or particularly skilled at the games it offers. Nev. Rev. Stat. 463.0129.1 provides in relevant
21 part:

22 (e) To ensure that gaming is conducted honestly, competitively and
23 free of criminal and corruptive elements, **all gaming establishments**
24

25 ² Not at issue at this point is the fact that the plaintiff was re-invited after the prior ejection.
Regardless of the decision under the arguments made herein, this fact would either be
determinative or present issues regardless of the determination of the present motion.

1 **in this state must remain open to the general public and the access**
2 **of the general public to gaming activities must not be restricted in**
3 **any manner except** as provided by the Legislature.³

4 (Emphasis added). Through judicial notice and the exhibits attached, it is obvious that the
5 defendant is a gaming establishment. By the clear and unequivocal terms of this section of Nev.
6 Rev. Stat. 463.0129, Caesars was required to provide plaintiff, as a member of the general
7 public, access to the gaming activities at its casino, and was bound by law to not restrict that
8 access absent a legitimate basis to do so. To put plaintiff out of the premises obviously restricted
9 plaintiff's access to "gaming activities," and the trespass of plaintiff runs afoul of the Caesars's
10 charge that such access must not be "restricted in any manner."

11 Admittedly there is a second part of Nev. Rev. Stat. 463.0129.1 providing,

12 3. This section does not: (a) Abrogate or abridge any **common-law**
13 right of a gaming establishment to exclude any person from gaming
14 activities or eject any person from the premises of the establishment
15 for any reason;

16 (Emphasis added). A careful analysis of this section, nonetheless, indicates the impropriety of
17 Caesars's actions in trespassing plaintiff and that Caesars's reliance on a right to trespass anyone
18 for any reason.

19 Caesars turns to Nev. Rev. Stat. 207.200 in Exhibit 1 for the authority to put plaintiff out
20 of its property and for the later arrest/detention of the plaintiff. The law forecloses application of
21 Nev. Rev. Stat. 207.200 for the ejection of a gambler. Pointedly, the express language of Nev.
22 Rev. Stat. 463.0129.1(e) establishes the impropriety of any reliance upon Nev. Rev. Stat.
23 207.200 by a gaming establishment. Nev. Rev. Stat. 207.200 provides a **statutory** basis for
24

25 ³ It appears that this section was added by NEVADA ASSEMBLY BILL NO. 770, 1991, ch.
371.

1 excluding persons from gaming establishments. Obviously a statute guarantying access subject
2 only to the express “common law” right to exclude does not reach a “statutory” right to exclude.

3 As a statute specific to gaming licensees, Nev. Rev. Stat. 463.0129.1(e) governs and
4 supersedes the general statute found at Nev. Rev. Stat.. 207.200. *See United States v. Estate of*
5 *Romani*, 523 U.S. 517, 532_118 S. Ct. 1478, 1487 (1998), *City Plan Dev. v. Office of the Labor*
6 *Comm'r*, 121 Nev. 419, 117 P.3d 182, n. 13 (2005). Thus, because the specific governs the
7 general, a statutory trespass warning under Nev. Rev. Stat. 207.200 that conflicts with the
8 provisions of broad and unfettered access specified in Nev. Rev. Stat. 463.0129.1(e) is
9 ineffective.
10

11 Secondly, in respect to the viability of Nev. Rev. Stat. 207.200 following the passage of
12 Nev. Rev. Stat. 463.0129, under Nevada law the latter statute has repealed the trespass statute as
13 concerns access to gaming, saving only “common law” right in the casino relative to trespass.
14 By expressly mentioning that the language does not abrogate or abridge “common law” authority
15 to exclude, Nev. Rev. Stat. 463.0129.3 necessarily abrogates and abridges “statutory” authority.
16 Moreover, under Nevada substantive law a later statute that “is basically inconsistent with” an
17 earlier statute impliedly repeals the earlier statute with respect to the inconsistency. *Southern*
18 *Nev. Tel. Co. v. Christoffersen*, 77 Nev. 322, 325, 363 P.2d 96 (1961). Nev. Rev. Stat. 463.0129
19 (1) (e), enacted in 1955, provides, “[A]ll gaming establishments in this state must remain open to
20 the general public . . .”. The legislature enacted Nev. Rev. Stat. 207.200 in 1911. To the extent
21 that the statutory authority in Nev. Rev. Stat. 207.200 could be used to exclude a member of the
22 general public from the premises of a gaming licensee through a trespass warning, the guarantee
23 of access in Nev. Rev. Stat. 463.0129.1(e) obviously repeals Nev. Rev. Stat. 207.200.
24
25

1 This is further supported by the language of Nev. Rev. Stat. 463.0129.3. Nevada applies
2 the rule of statutory construction *expressio unius est exclusio alterius* (expression of the one
3 excludes the alternatives).⁴ Nev. Rev. Stat. 463.0129.3 expressly states that it does not “abrogate
4 or abridge any **common-law**” right to eject. The legislature could have provided that it does not
5 ‘abrogate or abridge any legal right’ or ‘abrogate or abridge any statutory or common law right.’
6 Instead, it expressly limited the right to eject to any right to eject at common law. Thus,
7 logically and legally, under Nev. Rev. Stat. 463.0129.3, the requirements of access under Nev.
8 Rev. Stat. 463.0129.1(e) do necessarily “abrogate and abridge” any other right to exclude that is
9 not a “common law” right, and any **statutory** right of a casino to eject patrons from its casino no
10 longer survives. In short, any trespass warning under Nev. Rev. Stat. 207.200 is ineffective
11 under the requirements of unfettered access in Nev. Rev. Stat. 463.0129.1(e), and there can be no
12 legitimate application of Nev. Rev. Stat. 207.200 to a legally playing patron. Any such right, by
13 the express statement in Nev. Rev. Stat. 463.0129.1(e), must be found in the common law.

15 **2. UNDER THE COMMON LAW CAESARS COULD NOT EJECT PLAINTIFF FOR**
16 **ANY REASON, AND A LEGITIMATE REASON NOT PRESENT IN THIS CASE IS A**
17 **PREREQUISITE TO A LAWFUL EJECTION**

18 Because Nev. Rev. Stat. 463.0129.3 expressly provides that the legal duty to provide
19 access to the general public is limited to “any common-law right . . . to exclude . . .”, the scope of
20 the common law defines the right of the defendant to exclude the plaintiff. Under the common
21

22 ⁴ “‘*Expressio unius est exclusio alterius*.’ This is a well-recognized rule of statutory construction
23 and one based upon the very soundest of reasoning; for it is fair to assume that, when the
24 legislature enumerates certain instances in which an act or thing may be done, or when certain
25 privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of
specifying any? The rule invoked is so thoroughly recognized, not only by the courts generally,
but by our own court, that it would be puerile to dwell upon the question presented, further than
to quote from the decisions of our own court.” *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619
(1920)

1 law Caesars had no right to exclude or eject plaintiff, and therefore, Caesars's demands on the
2 ejection of September 23, 2007 violated Nev. Rev. Stat. 463.0129.1(e).⁵

3 Under the common law the defendant cannot eject plaintiff. The authority under the
4 common law on the issue of the right of a business open to the public, especially an amusement
5 business, to exclude patrons or prospective patrons provides a rule contrary to the rule the
6 legislature stated. Businesses open to the public have no right under the common law to exclude
7 a patron for any reason.

8
9 The common law as applied in Nevada is the common law as it existed in 1864. *See*
10 *Cheung v. Eighth Judicial Dist. Court of Nev.*, 124 P.3d 550, 553 (Nev. 2005). The common law
11 precedent closest in time to Nevada becoming a state and adopting Nev. Rev. Stat. 1.030
12 (recognizing the common law) appears to be found in *Commonwealth v. Power*, 48 Mass. 596,
13 1844 Mass. LEXIS 48 (1844). In *Power*, the plaintiff opened its depot for the customers of its
14 railroad.⁶ A local innkeeper made a practice of going upon the railroad's depot property to
15 solicit customers, and had been informed that the railroad prohibited this activity. Upon
16 appearance of the innkeeper at the depot she was forcibly removed. The state brought assault
17 and battery charges against the railroad's employees that removed the innkeeper. The innkeeper
18

19 ⁵ While the legislature included within its statement concerning the "common law" the purported
20 "right . . . to eject any person from the premises of the establishment for any reason," the
21 "common law" is the "common law," and legislators have no ability to define its scope. *See*
22 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 247 (1990) ([Common law
23 is] "law created primarily through judges by their decisions rather than by the framers of statutes
24 or constitutions . . ."), THE VITAL COMMON LAW: ITS ROLE IN A STATUTORY AGE 18
25 U. Ark. Little Rock L.J. 555, 558 (1996). Indeed, it is self evident that the legislature can no
more create "common law" than a judge can legislate. Here the express statutory terms
purportedly recognizing a common law ability to eject for any reason do not create any law. The
legislature cannot make the common law. Still, the statute references the "common law," which
is quite different from how the Nevada legislature apparently perceived it.

1 maintained that she was a traveler that entered the depot for travel to Richmond, a purpose
2 contemplated for the public's access *vis a vis* the business. The court noted that the record was
3 devoid of any indication that the innkeeper informed the railroad's agents that she was partaking
4 in the business offered rather than soliciting boarders as she had in the past. Following
5 conviction the employee appealed. In remanding for a new trial the court reasoned that if the
6 railroad's employees believed that the innkeeper was undertaking activities other than the
7 business offered by the depot, then there would be no crime. I.e., the employee had a right to
8 eject a person on the premises that was not undertaking the business offered, and correlatively,
9 under the common law, the employee had no basis to eject a person legitimately on the premises
10 and partaking in the business the proprietor offered to the general public.
11

12 Stating the limits of the common law right of a business open to the public to exclude
13 persons, the court ruled:

14 That the opening of depots and platforms for the sale of tickets,
15 for the assembling of persons going to take passage, or landing from
16 the cars, amounts in law to **a license to all persons, prima facie, to**
17 **enter the depot, and that such entry is not a trespass**; but that it is a
18 license conditional, subject to reasonable and useful regulations; **and,**
on non-compliance with such regulations, the license is revocable,
and may be revoked either as to an individual, or as to a class of
individuals, by actual or constructive notice to that effect

19 *Id.*, at 603. (Emphasis added).⁷ In other words, under the common law a patron holds a
20 conditional license to be upon the premises of a business open to the public. Further, so long as
21

22 ⁶ *Power* was decided in the early days of railroads, and does not appear to be discussing railroads
23 as common carriers with special duties. Rather, it appears to be discussing the general common
law status of a legal patron to a general business open to the public.

24 ⁷ *And see Donnell v. State*, 48 Miss. 661, 680-681, 1873 Miss. LEXIS 89, **30 (1873): "**Among**
25 **those customs which we call the common law**, that have come down to us from the remote
past, are rules which have a special application to those who sustain a quasi public relation to the
community. The wayfarer and the traveler had a right to demand food and lodging from the inn-
keeper; . . . So, too, **all who applied for admission to the public . . . amusements, were**

1 the patron is legitimately partaking of the business offered, not being disruptive or disorderly,
2 and so long as the patron continues about the business offered, the license is irrevocable.

3 More modern authority supports this conclusion as well. In fact, there is a case on point
4 with the current circumstance and discussing the common law as it applies to advantage
5 gamblers (specifically card counters such as the plaintiff. In *Uston v. Resorts International*
6 *Hotel, Inc.*, 445 A.2d 370 (N.J. 1982), a casino had excluded infamous card counter Ken Uston.
7 Mr. Uston brought an action to determine his right to be in the casino and play blackjack. The
8 casino defended on the same basis that the Caesars apparently ejected the plaintiff, to wit:
9 Casinos have a right to exclude anyone for any or no reason. The question addressed by the
10 court was, therefore, the precise question raised here. That is: Is there “a common law right of
11 [an amusement place owner] to exclude anyone at all for any reason.” *Id.*, at 373. The New
12 Jersey Supreme Court, with an expansive discussion of historic common law precedent,
13 concluded that there simply was no such common law right, and in fact, under long established
14 common law precedent a patron holds a common law right of access which is not to be
15 arbitrarily revoked.

17 The *Uston* court then went on to apply the common law to the contentions of the casino
18 and Mr. Uston. The record, unmodified by the decision, included the lower court’s finding that
19 “it is only Uston's skill as a player of blackjack that gives rise to Resorts' desire to bar him from
20 participating as a player at the blackjack games.” *Uston v. Resorts International Hotel, Inc.*,
21 431 A.2d 173, 175 (N.J. App. 1981). It was thusly noted, as also recognized in Nevada, that
22 card counting was a legitimate strategy in playing the game of blackjack. With Mr. Uston
23

25 **entitled to admission**, and in each instance, for a refusal, an action on the case lay, unless
sufficient reason were shown.” (Emphasis added).

1 playing a legitimate strategy in the game offered, and not otherwise disrupting the operations of
2 the casino, the New Jersey Supreme Court concluded that casinos, under the common law, have
3 duties to patrons as follows:

4 [T]hey have a duty not to act in an arbitrary or
5 discriminatory manner toward persons who come on their
6 premises. T[his] duty applies . . . to all property owners who open
7 their premises to the public. Property owners have no legitimate
8 interest in unreasonably excluding particular members of the
9 public when they open their premises for public use.

10 [C]ommon law principles enable the casino to bar from its
11 entire facility, for instance, the disorderly, the intoxicated, and the
12 repetitive petty offender.

13 Respondent Uston does not threaten the security of any
14 casino occupant. Nor has he disrupted the functioning of any
15 casino operations. Absent a valid contrary rule by the [Gaming]
16 Commission, Uston possesses the usual right of reasonable access
17 to Resorts International's blackjack tables.

18 *Uston*, 445 A.2d at 375. The court then granted Uston the requested relief, to wit: An
19 injunction barring the defendant from excluding Mr. Uston from its premises or preventing him
20 from playing blackjack.⁸

21 Applying this common law to the plaintiff as a patron, Caesars held no common law
22 right to eject the plaintiff. Pointedly, Caesars obviously opens its business to the public, and is
23 even required by statute to do so. Upon entry on the property, plaintiff holds a license to be
24 there. This license is revocable, but only upon non-compliance by plaintiff with “reasonable
25 and useful” regulations. Plaintiff’s actions are identical to those of Mr. Uston, and none of them
are in conflict with Caesars’s responsibilities as a gaming licensee. In full accord with *Uston*,
Caesars could not eject plaintiff under the common law.

⁸ Note: The *Uston* court found this inability of a casino to eject a legally playing customer even without a statute guarantying access such as Nev. Rev. Stat. 463.0129(e).

1 It is expected that Caesars will respond that the plaintiff misstates the common law and
2 it had a right to eject plaintiff for any or no reason. While many states have modified the
3 common law to allow for ejection for any or no reason, Nevada has not done so. More
4 importantly, when the reason for the modification of the common law in some states is
5 examined, it is inadvisable to grant such a common law right in Nevada.

6 So, what is the historic right under the “common law” of the owner of a public place of
7 amusement to exclude or eject a member of the public? There is no published Nevada Supreme
8 Court case on the right of an amusement business open to the public to exclude a member of the
9 public absent a violation of the reasonable rules and regulations of the business, but there is
10 authority. The common law authority on the issue is found in the authority cited by plaintiff,
11 and under application of NRS 1.030, that common law authority is Nevada authority. In other
12 words, the “common law” is part of the law of Nevada and therefore, Nevada authority. It is to
13 be determined as of the date Nevada entered into the Union. *See Cheung v. Eighth Judicial*
14 *Dist. Court of Nev.*, 124 P.3d 550, 553 (Nev. 2005). That is, by statutory dictate under Nev.
15 Rev. Stat. 1.030 and by adoption of NRS 463.0129, the law of Nevada on the issue is the
16 historic law of England and other common law jurisdictions on the issue as of 1864. Therefore,
17 the right of a business open to the public to evict a legitimate patron under the common law as
18 of 1864 defines that right for the purposes of this motion and application of NRS 463.0129.

19
20
21 Returning to *Uston v. Resorts International Hotel, Inc.*, 445 A.2d 370 (N.J. 1982), the
22 case provides a compilation of historic common law authority that the eviction of a customer
23 from an amusement open to the public is limited to customers that are acting in such a way as to
24 render such eviction reasonable, and an eviction without a reasonable legitimate reason is
25 tortious. *Uston* also cites *Bell v. Maryland*, 378 U.S. 226, 299 (U.S. 1964), noting the following
in a concurring opinion:

1 "Among those customs **which we call the common law**, that
2 have come down to us from the remote past, are rules which have a
3 special application to those who sustain a quasi public relation to the
4 community. The wayfarer and the traveler had a right to demand food
5 and lodging from the inn-keeper. . . . So, too, **all who applied for
admission to the public . . . amusements, were entitled to
admission**, and in each instance, for a refusal, an action on the case
lay, unless sufficient reason were shown.

6 (Emphasis added). *Bell v. Maryland*, 378 U.S. 226, 299 (U.S. 1964). Thus, from the highest
7 authority, under the common law, absent a reasonable reason, as of 1864 a member of the public
8 could not be ejected from a public amusement (i.e., a park, carnival, a theatre, or casino), and any
9 such ejection was actually actionable as a tort against the proprietor. *And see Donnell v. State*,
10 48 Miss. 661, 680-681, 1873 Miss. LEXIS 89, **30 (1873), *Grannan v. Westchester Racing*
11 *Ass'n*, 16 A.D. 8, 20 (N.Y. App. Div. 1897) (Recognizing common law rule, but reversed at 47
12 N.E. 896 (N.Y.1897) with the court finding that the exclusion of the person was based on
13 reasonable grounds), *Commonwealth v. Power*, 48 Mass. 596, 1844 Mass. LEXIS 48 (1844),
14 *People v. King*, 18 N.E. 245, 247 (N.Y. 1888). This is the common law applied in Nevada,
15 places of public amusement cannot exclude patrons for any or no reason, and this common law
16 provides the rule of decision for this matter.

17
18 The court in *Uston* admittedly noted that many jurisdictions modified this common law
19 rule following the adoption of the Civil War Amendments, and went on to explain why this
20 modification of the common law occurred. Not all jurisdictions modified the common law,
21 however. *Accord State v. Tauvar*, 461 A.2d 1065 (Me. 1983) (Absent conduct providing a
22 reasonable and legitimate basis for exclusion, persons have a right to be in places open to the
23 public by private entities). The modification in some jurisdictions engendered by the Civil War
24 Amendments was to change the common law rule from restricting ejection to only those
25 instances where there was a legitimate and reasonable basis, and granting the authority of a

1 proprietor to eject for any or no reason. Pointedly, nonetheless, the common law in Nevada,
2 unless modified by subsequent judicial decision, is the common law as of 1864, and would not
3 include the common law as modified in other jurisdictions following this date. No Nevada
4 authority followed the other states in changing the common law in this respect, and therefore, the
5 common law in Nevada persists in the sense that a casino cannot eject a patron without a
6 legitimate and reasonable basis.

7
8 Nor would it be wise or appropriate to declare, for the first time under Nevada law, that
9 the common law is modified to allow ejection for any reason whether reasonable or not. In
10 *Uston*, the New Jersey Supreme Court actually retracted the State’s modification of the common
11 law and reestablished the historic common law requiring a legitimate and reasonable basis for
12 excluding a patron from a business establishment open to the public. It was noted that up until
13 the Civil War Amendments to the Constitution the common law fully recognized the impropriety
14 of ejecting a **white** person from a business establishment without a legitimate reason. *Uston* at
15 171, and see *People v. King*, 18 N.E. 245, 247 (N.Y. 1888) (Recognizing the right of white
16 people at common law to access to places of public amusement, and finding constitutional a law
17 that extended that same right to “citizens of African descent”).

18 The effect of the Civil War Amendments was to extend the common law to African-
19 Americans as well as whites. Following these enactments, many states began to modify their
20 common law to allow a proprietor offering services to the public to exclude any person for any
21 or no reason. This ‘blanket’ allowance granted proprietors the ability to exclude non-whites
22 without violating the law. *Uston* pointed out that this original rationale for departure exhibited
23 “less than dignified reasons,” and had none of the rigmarole. The states that modified the
24 common law allowing broader rights to exclude or eject did so in order to perpetuate the rights of
25 business owners to refuse service to minorities. The New Jersey Supreme Court in *Uston*,
refused to accept as part of their common law a modification that was enacted for the purpose of

1 advancing segregation and discrimination against Afro-Americans, and the court reestablished
2 the common law in New Jersey as requiring places of public amusement to be accessible to all
3 absent a legitimate and reasonable basis for exclusion.

4 Simply, as alluded in *Uston*, the common law had been modified in many states as a ‘Jim
5 Crow’ law. The law that does not apply here because it is statutory, Nev. Rev. Stat. 207.200,
6 itself has the badges of ‘Jim Crow’ legislation having been enacted for the purpose of eradicating
7 the common law rule requiring that businesses remain open to the public, and allowing
8 proprietors to exclude racial minorities from their premises. Pointedly, it was enacted in 1911,
9 dead smack in the middle of the nationwide proliferation of ‘Jim Crow’ legislation. *See Bell v.*
10 *Maryland*, 378 U.S. 226, 308 (U.S. 1964), n. 26 and n. 27. This, incidentally, also provides a
11 strong indication that the common law in Nevada is quite different than Nev. Rev. Stat. 207.200
12 because, if the common law were in accord with Nev. Rev. Stat. 207.200, then there would have
13 been no reason to enact the statute. Nevertheless, under NRS 463.0129(e), NRS 207.200
14 provides no authority to gaming licensees, and the authority of gaming licensees to trespass an
15 individual is limited to the common law.

17 Although Nev. Rev. Stat. 207.200 arguably presents a statutory retreat from the “common
18 law,” and allows the ejection of a patron for any or no reason, the Nevada judiciary has never
19 retreated from the “common law,” and the statutory retreat cannot provide a basis for ejecting a
20 patron. Nevada has no judicial authority that ever removed the common law from its history of
21 mandating access of the public to places open to the public. Indeed, Nevada appears to be one
22 of the few states with no Supreme Court authority that, at some point, allowed a denial of public
23
24
25

1 or private access on the basis of race.⁹ Like New Jersey, Nevada and this court should avoid
2 accepting, as the common law, a modified rule that came into effect primarily for the purpose of
3 allowing institutionalized discrimination on the basis of race, and the State and the Federal
4 Courts sitting in the State should be cemented as a bastion of equality under the law where the
5 judicial history remains untainted by acceptance of rules constructed to forward societal
6 discrimination.¹⁰ In 1864 the law in Nevada was that public businesses cannot eject patrons
7 without a legitimate, reasonable basis. Unless this court holds that since 1864, Nevada's
8 common law changed through the addition of a 'Jim Crow' overlay, then today the law in
9 Nevada remains that public businesses, especially businesses of public amusement, cannot eject
10 patrons without a legitimate, reasonable basis.

11 *Uston* then evaluated the question that directly addresses the issue before this court. Is
12 there a reasonable reason for a casino, as a public amusement, to eject an advantage gambler
13 because (s)he is an advantage gambler. The court answered with an emphatic 'no.' Pointedly, as
14 noted, there was no disruption by the method, the method was legal, and by playing the game the
15 casino offered to the public, no reasonable or legitimate basis existed allowing the casino to eject
16 the "card counting" patron. I.e., it would be a violation of the law for the casino to do so. *Uston*
17 at 445 A.2d 375. Applying Nevada law should achieve the same result.. Pointedly, pursuant to
18 NRS 463.0129, Caesars is not allowed to choose its customers but must accept the public,
19 plaintiff was a customer playing by the rules, and Caesars was not allowed to exclude plaintiff.

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23 ⁹ The case of *Application of Kellar*, 81 Nev. 240 (1965), is close where the petitioner noted that
24 the State Bar of Nevada had never admitted a "negro" to the practice of law, but the decision
does not ratify this basis.

25 ¹⁰ For those states that did modify their common law in order to allow proprietors to exclude
anyone, the passage of the Civil Rights Act of 1964 modified this rule as to race, etc. *See*
Katzenbach v. McClung, 379 U.S. 294 (U.S. 1964)

1 **D. CAESARS IS LIABLE FOR THE FALSE IMPRISONMENT OF THE PLAINTIFF**

2 On March 19, 2008, plaintiff was detained and arrested by Caesars for returning after
3 having been given a trespass warning purportedly issued under Nev. Rev. Stat. 207.200.
4 Affidavit, Exhibit 3, ¶ 6, and Exhibit 2. As noted above, having been superseded by Nev. Rev.
5 Stat. 463.0129(e), gaming licensees are foreclosed from relying upon or applying the statute
6 found at Nev. Rev. Stat. 207.200, and are relegated solely to the common law in finding a basis
7 to exclude or eject a member of the public.

8 False imprisonment is the unlicensed and impermissive detention of the plaintiff against
9 her will. It is established at such point as plaintiff's freedom of movement is curtailed either
10 physically or by unequivocal directives.¹¹

11 False imprisonment is explained more fully in Nevada's criminal statutes. In this respect,
12 the definition of the **crime** of false imprisonment is instructive. Per Nev.Rev.Stat. 200.460
13 "False imprisonment is an unlawful violation of the personal liberty of another, and consists in . .
14 . detention without sufficient legal authority. A person convicted of false imprisonment . . . is
15 guilty of a gross misdemeanor." The turning factor in the statute and under tort law is legal
16 authority (detention + no legal authority=false imprisonment). In this respect, the analysis below
17 demonstrates that plaintiff not only suffered a tortious false imprisonment, but was also a victim
18 of criminal false imprisonment by defendant.
19

21
22 ¹¹ Prosser addresses false imprisonment as follows:

23 The action for the tort of false imprisonment, sometimes called false
24 arrest, is another lineal descendant of the old action of trespass. It
25 protects the personal interest in freedom from restraint of movement.
 . . . [T]he plaintiff may be imprisoned when restrained in the open
 street, or in a traveling automobile, or when confined to an entire
 city, or compelled to go along with the defendant.

Prosser on Torts, Ch 1, § 11.

1 Concerning the critical factor of 'legal authority' Nevada statutes are express and clear
2 as to when a gaming licensee holds legal authority to detain or seize a person. A gaming
3 licensee can detain for suspicion of cheating, when there is probable cause to believe that the
4 detainee is an at large felon, or a citizen's arrest for a crime committed. Nev.Rev.Stat. 465.101,
5 171.1235, and 171.126. That is all the legal authority to detain that Caesars held. Because
6 Caesars must allow access save for a common law right to exclude or eject, the prior trespass
7 warning given pursuant to Nev. Rev. Stat. 207.200 was a legal nullity. With access mandated
8 and the prior trespass being a nullity, the detention of plaintiff for a violation of Nev. Rev. Stat.
9 207.200 cannot be a legitimate citizen's arrest. Caesars' detention of the plaintiff was without
10 legal authority, false imprisonment occurred, and plaintiff is entitled to partial summary
11 judgment.
12

13 **III. REQUEST FOR RELIEF**

14 For the foregoing reasons plaintiff requests partial summary judgment determining
15 Caesars liable for the false imprisonment of the plaintiff.

16 Dated this 2d day of July, 2008.

17 NERSESIAN & SANKIEWICZ

18
19 /S/

20 Robert A. Nersesian, Esq.
21 Nevada Bar No. 2762
22 528 South 8TH Street, Suite A
23 Las Vegas, Nevada 89101
24 Attorneys for Plaintiff

25 **CERTIFICATE OF SERVICE**

26 On this 2d day of July, 2008, the undersigned did serve a copy of the foregoing motion
27 for partial summary judgment upon Philip S. Gerson, attorney through the CMECF system

maintained by this court.

/S/
Robert A. Nersesian